

REVIEWING LEGAL FICTIONS

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To appreciate how much warmth and light were generated when law, humanities, and spring marched into Georgia together last March, you really had to be there. We pondered James Boyd White's question, "What should be the erotics of legal criticism?,"¹ and wondered how such a question might conceivably relate to Robert Cover's jeremiad, "It is a plain and nasty thought that death and pain are at the center of constitutional interpretation."² Milner Ball's excellent work on law and metaphor³ provided crucial connectives; his call to batter the bulwarks and work toward organic and utopian possibilities helped rally the skeptics and even responded to the cynics. But that glorious early spring turned into Georgia's worst drought in a century, and the sudden death of Bob Cover intruded to change us all.

Words fail us. No one can begin to convey the sense of tragedy that now connects those who were in Georgia then, because the conference was to be Bob Cover's last. As always, Bob was passionately engaged with words and texts, with what was happening inside and out and at the margin. He talked with fervor of spring training and the Red Sox, and with humor about Talmudic passages and his time in jail in Georgia two decades earlier.

Visibly, and wonderfully, Bob shared it all with his son, Avidan. Avidan appreciated Bob's talk and exuberantly enjoyed the beach

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¹ White, *Judicial Criticism*, 20 GA. L. REV. 835, 845 (1986).

² Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 827 (1986).

³ M. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* (1985).

*and the touch football and the adventure of Sapelo Island after the conference. Together, Bob and Avidan were a portrait of how a father and son can delight in one another. It is impossible to grasp that Bob will no longer directly share with Avidan, Leah, and Diane—nor with the rest of us—his verve and his brilliance in pursuit of the complexities of moral choice.*⁴

He was unusual and unusually stubborn, but Bob Cover pursued justice actively. He lived the life of a good man. Hundreds of us who learned from him share the feeling that we were in mid-sentence in a vital conversation with an exceptionally wise person. And it was the kind of conversation that might help us change our minds and alter our actions. We have less of what matters most. Yet we write on.

INTRODUCTION

The government of the Union rests almost entirely on legal fictions. The Union is an ideal nation which exists, so to say, only in men's minds and whose extent and limits can only be discerned by the understanding.⁵

I want to discuss legal fictions. Curiously, legal fictions are not discussed much by those who analyze law and literature or interpret law as literature. Yet the appropriate role for legal fictions is an issue that those of us who teach law bump into constantly. There is a widespread, albeit somewhat vague idea that Lon Fuller wrote quite intelligently about legal fictions a long time ago,⁶ but few in America seriously grapple with the use and abuse of legal fictions. Yet, after the influence of the realists and the economists, the

⁴ In R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975), Bob expressed his "deepest debt" to Professor Joseph Lukinsky of the Jewish Theological Seminary, "who first opened my eyes to the complexity of moral choice." *Id.* at xix. Fittingly, Bob in turn opened many eyes to such issues, both inside and outside the classroom.

⁵ A. TOCQUEVILLE, *DEMOCRACY IN AMERICA* 164 (J. Mayer ed. 1969), discussed in R. FERGUSON, *LAW AND LETTERS IN AMERICAN LITERATURE* (1984).

⁶ See Fuller, *Legal Fictions*, 25 ILL. L. REV. 363 (1930); Fuller, *Legal Fictions*, 25 ILL. L. REV. 513 (1931); Fuller, *Legal Fictions*, 25 ILL. L. REV. 887 (1931). These essays have been combined into L. FULLER, *LEGAL FICTIONS* (1967) [hereinafter cited as L. FULLER, *LEGAL FICTIONS*].

proper place for legal fictions is a particularly intriguing problem.

In discussing legal fictions, I want to suggest that they pose special challenges for the best work on law and literature, such as that by Professors Ball, Cover, Weisberg, and White. First, I will try to clarify what I mean by legal fictions. I do not propose to offer a typology of legal fictions but a few general comments about how legal fictions fit into our post-realist world. Second, I will focus on a few leading fictions, both literary and legal, to suggest and assess a continuum in law and literature. By examining James Boyd White's celebration of Brandeis' famous *Olmstead v. United States*⁷ dissent in conjunction with Bob Cover's warning about pain and death lurking behind judicial pronouncements, I seek to consider why it seems so vital, in both American law and letters, to ignore or invent history. Third, I want to suggest why we may need fictions in and about law to challenge our nation's complacent faith in American continuity and progress. We need words in law to learn the sins as well as the glories of the past, to give voice to current conflicts, and to retell and recreate our own myths.

As a preliminary matter, I might explain that I divide my discussion into three themes only in part because the law review format seems to require that at least three themes be discussed. I also pursue three themes to continue a vital tradition. Lawyers love the power of classifying into threesomes, though it is hard to be certain why. Vestigial trinitarian faith might help explain the phenomenon. The number and prominence of lawyers who are not of trinitarian or any other faith, but who still relish tripartite tests and "on the third hand" arguments, however, undercut that explanation somewhat. Undoubtedly, dividing into threes has deep anthropological roots,⁸ to say nothing of the way the tripartite approach reflects the ineffable impact of such triple plays as Aristotle's classifications, Julius Caesar's Gaul, Montesquieu's separation of powers, the three branches of our federal government and, perhaps most

⁷ 277 U.S. 438 (1928).

⁸ See generally F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 80-81 (1985) (discussing and collecting sources on the history of the tripartite approach). My colleague, David Seipp, points out that legal trichotomization clearly predates Christianity. See H. GOUDY, *TRICHOTOMY IN ROMAN LAW* 17 (1910).

appropriately, Cerberus, the three-headed dog said to guard the entrance to Hades.

The best explanation for the power of the threefold approach in legal thought, however, probably is its direct connection to juggling. We can, by discerning three central points in any and all issues, camouflage our moves while we give the appearance of cool rationality. A world of threesomes suggests the need for sophisticated analysis: this offers an almost irresistible opportunity for a profession claiming to be composed of expert generalists who are able to balance incommensurate items in a single bound. The triads permit triage. They allow the lawyer to plunge to the bottom line without ever revealing what is left up in the air. Legal fictions, I will argue, perform much the same function.

I. LEGAL FICTIONS REVISITED

A. *Further than Fuller?*

Hardly anybody in the United States talks much about legal fictions these days.⁹ Why not? Certainly our scholarly silence is not

⁹ The leading exception to that bold statement is G. CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM* (1985) [hereinafter cited as G. CALABRESI, *IDEALS, BELIEFS, ATTITUDES*]. Dean Calabresi has discussed legal fictions and subterfuges elsewhere, see, e.g., G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 172-77 (1982), but they play a more prominent role in his new and intriguing book. For a crisp review, including a fine critical discussion of Calabresi's view of legal fictions, see Abrams, *A Constitutional Law for the Age of Anxiety* (Book Review), 73 CALIF. L. REV. 1643 (1985). See also Block, *Suits Against Government Officials and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946); Note, *Penumbras and Privacy: A Study of the Use of Fictions in Constitutional Decision-Making*, 89 W. VA. L. REV. 859 (1985).

Legal fictions seem to be of somewhat greater concern in Canada and England, perhaps in part because the weight of Jeremy Bentham's criticism of both small and large legal fictions is more directly felt where there is less of a tradition of hiding behind interpretation of a written constitution. For a Canadian discussion, see Samek, *Fictions and the Law*, 31 U. TORONTO L.J. 290 (1981), which provides a useful review of Bentham, Vaihinger, and Fuller, and then applies Samek's own "meta-phenomenon" theory. For two English discussions, see Birks, *Fictions Ancient and Modern*, in *THE LEGAL MIND: ESSAYS FOR TONY HONORÉ* 83 (N. McCormick & P. Birks eds. 1986); Simpson, *The Common Law and Legal Theory*, in *LEGAL THEORY AND COMMON LAW* 8 (W. Twining ed. 1986). Independently, my friends Martha Minow and John Leubsdorf have pointed out a quite good poem by the English poet and critic, William Empson, titled *Legal Fiction* in W. EMPSON, *POEMS* 23 (1930). The specific legal fiction Empson took as his theme was the presumption that one who owned soil owned all the way to the

because reliance on legal fictions has disappeared. To the contrary: in the half century since Lon Fuller explored the cave of legal fictions and disclosed that they promoted function, form, and sometimes even fairness, legal fictions no longer merely serve as an "awkward patch"¹⁰ on the fabric of law, as Fuller put it. Fuller considered legal fictions a kind of necessary evil for systematic thinking about law. He viewed legal fictions as akin to working assumptions in physics: they provided a kind of scaffolding, but were not intended to give essential support nor to deceive. After their useful function had ended, legal fictions should and could be readily removed.¹¹

Fuller defined a legal fiction as "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility."¹² Although it is amusing to consider the various conflicting definitions of "legal fiction" in the standard sources today,¹³ no one really has improved

heavens and to the depths. C. DONAHUE, JR., T. KAUPER, & P. MARTIN, *CASES AND MATERIALS ON PROPERTY* 291 (1974). See generally W. EMPSON, *SEVEN TYPES OF AMBIGUITY* (1930), and the extensive work by Owen Barfield, including in particular, *Poetic Diction and Legal Fiction*, in O. BARFIELD, *THE REDISCOVERY OF MEANING, AND OTHER ESSAYS* 44 (1977). There is also an intriguing essay by Alf Ross, a Danish law professor, in which he compares legal fictions to literary, poetic, scientific, and mythic fictions. See Ross, *Legal Fictions*, in *LAW, REASON AND JUSTICE* 217 (G. Hughes ed. 1969).

¹⁰ L. FULLER, *LEGAL FICTIONS*, *supra* note 6, at viii. Fuller also argued that, to a certain extent, fictions are "simply the growing pains of the language of the law." *Id.* at 22. For an important discussion of antebellum judges who retreated into formalism rather than embrace more flexible approaches already available in the development of both law and language, see R. COVER, *supra* note 4, at 126-48. In the course of this discussion, Cover dusted off Francis Lieber's *Legal and Political Hermeneutics* (1839). Lieber's artifact unfortunately has been generally forgotten again, however, despite the current vogue for hermeneutics in legal academia.

¹¹ In numerous areas, the ability to separate scaffolding from structure, or base from superstructure, seems more problematic today. In law, for example, we have an ongoing debate about the relative autonomy of law. See Soifer, *Listening and the Voiceless*, 4 *MISS. C. L. REV.* 319, 325 (1984), and sources cited therein. In architecture, controversy rages about the Pompidou Centre in Paris and, more recently, the concepts which now support the headquarters of staid old Lloyd's of London. The scaffolding is intertwined with the structure, and some professionals seem anxious to expose the tangle to passers-by.

¹² L. FULLER, *LEGAL FICTIONS*, *supra* note 6, at 9.

¹³ Compare BALLENTINE'S *LAW DICTIONARY* 468 (3d ed. 1969) (a legal fiction is "a contrived condition or situation; the simulation of a status or condition

upon Fuller's definition. In our post-realist world, however, our sense is that legal fictions are not some small, awkward patch but rather the whole seamless cloth of the law. This transforms the problem of defining and explaining legal fictions. That legal fictions pervade the law today is not necessarily always a bad thing, as I will discuss. It may be, in fact, that it is the very pervasiveness of legal fictions that camouflages them and keeps us from seeing and evaluating a phenomenon which permeates our legal culture.

Fuller's classic examination and taxonomy of legal fictions illuminated Sir Henry Maine's assertion that legal fictions "satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present."¹⁴ To Maine, legal fictions were "invaluable expedients for overcoming the rigidity of law" but were also "the greatest of obstacles to symmetrical classification."¹⁵ For all the impressive insight in Fuller's analysis, with which he advanced far beyond Maine's complacent legal anthropology, Fuller still somewhat desperately sought symmetry. Today, we have moved—and perhaps progressed—beyond Fuller's concepts and Maine's paradoxes. We may not all have become anti-symmetric, but we now tend to regard law as a gyrating classification system full of overlaps, gaps, and incommensurate variations. Indeed, Grant Gilmore's definition of law in general echoed Maine's definition of legal fictions. Gilmore claimed that "the process by which a society accommodates to change without abandoning its fundamental structure is what we mean by law."¹⁶

Following Gilmore, a powerful claim can be made that legal fictions attract little attention today precisely because they so dominate American law. Post-realist lawyers, scholars, and judges concede that legal fictions are the tools of our legal trade. As suggested by Fuller's definition, we use legal fictions not intending to deceive.

with the purpose of accomplishing justice, albeit justice reached by devious means") with BLACK'S LAW DICTIONARY 804 (5th ed. 1979) (a legal fiction is an "assumption of fact made by court as basis for deciding a legal question").

¹⁴ H. MAINE, ANCIENT LAW 25 (3d Am. ed. 1873). Fuller actually did not quote or discuss this particular insight by Maine directly.

¹⁵ *Id.* at 26.

¹⁶ G. GILMORE, THE AGES OF AMERICAN LAW 14 (1977).

Yet we also do not actually believe the truth or accuracy of the doctrines we deftly crunch.

There may be reasons to attempt to distinguish small legal fictions from more encompassing legal fictions. The problem with maintaining such a distinction, however, is that legal fictions do not hold still. Once announced, a small legal fiction may create new relationships and expectations; if accepted, a legal fiction channels thought.

Precisely because legal fictions are not static, they may grow to influence or even control how we think or refuse to think about basic matters. The fiction that a corporation is a person for certain constitutional purposes, for example, obviously has spread like kudzu in the century since the Supreme Court first propounded it.¹⁷ We employ legal fictions to preserve a notion of continuity with the past, yet legal fictions help short-circuit attempts to comprehend the complexity behind the assumptions a legal fiction conveys. Like sunlight, legal fictions affect how growth will tilt.¹⁸ There is significant irony in our commitment to preservation of "a government of laws and not of men"¹⁹ alongside our reverence for pragmatic solutions to pluralist problems.

To be sure, this antinomy is nothing new. Yet few Americans ever have gone or would now go as far as Jeremy Bentham did in condemning legal fictions. Bentham's marvelous invectives included his claim that "in English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness."²⁰ If fictions are to justice "[e]xactly as swindling is to trade,"²¹ as Bentham put it, we Americans tend to exalt trade so much that we tolerate a good deal of swindling.

¹⁷ *Santa Clara County v. Southern Pac. R.R.*, 116 U.S. 394 (1886).

¹⁸ See the discussion of legal culture in L. FRIEDMAN, *TOTAL JUSTICE* 31-43, 72 (1985).

¹⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (borrowing from MASS. CONST. of 1780, art. XXX). The phrase apparently originated in the work of James Harrington. See generally Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

²⁰ J. BENTHAM, *The Elements of the Art of Packing, As Applied to Special Juries, Particularly in Cases of Libel Law*, in 5 WORKS OF JEREMY BENTHAM 92 (J. Bowring ed. 1843), quoted in L. FULLER, *LEGAL FICTIONS*, *supra* note 6, at 2.

²¹ J. BENTHAM, *Rationale of Judicial Evidence, Specially Applied to English Practice*, in 7 WORKS OF JEREMY BENTHAM 283 (J. Bowring ed. 1843), quoted in L. FULLER, *LEGAL FICTIONS*, *supra* note 6, at 3.

Indeed, we embrace and even celebrate the Yankee trader, the flim-flam man, and the innovative judge.

In constitutional law, legal fictions are at least as pervasive as they are in what is still, with endearing nostalgia, called private law. It is not necessary to plunge into the current battle over originalist or interpretivist approaches to constitutional law to perceive that a great judge in a constitutional case has to do more than merely look up the answer. But what is it we want a good or great post-realist judge to do?²²

A large element in seeming to do law well, of course, is making good guesses about the future. For example, it now appears to nearly everyone that the majority in *Plessy v. Ferguson*²³ guessed incorrectly. Moreover, even in our current mood of recrudescent restraint in protecting civil rights, *Brown v. Board of Education*²⁴ still seems to most people a decision which, at the least, moved the law in the right direction. Another factor we often consider

²² Ronald Dworkin has been a leader in examining this question throughout his many publications. See, e.g., Dworkin, Book Review, 28 N.Y. REV. BOOKS 3 (1981) (reviewing W. DOUGLAS, COURT YEARS, 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS (1980)). Dworkin has noted and discussed Douglas' astonishing claim that, coming from the belly of the beast of legal realism at Columbia and Yale Law Schools and Washington, D.C. during the New Deal, Douglas nevertheless was "shattered" to be told by Chief Justice Charles Evans Hughes upon Douglas' elevation to the Supreme Court that "ninety percent of any decision is emotional." *Id.* at 4.

Dworkin's most recent and most successful consideration of the judicial role is in R. DWORKIN, LAW'S EMPIRE (1986), which includes his provocative analogy of the appropriate constraints on a judge to being told to write part of a chain novel. *Id.* at 228-38.

²³ 163 U.S. 537 (1896).

²⁴ 347 U.S. 483 (1954). It is still difficult to discern exactly what right Chief Justice Earl Warren's unanimous opinion recognized and, of course, there is even more controversy about how such a right or rights are to be protected. Nevertheless, as Charles Black put it in reference to "the pursuit of happiness," it makes sense to "mov[e] toward [a] goal, as one may move eastward, though 'east' itself will never be attained." Black, *Further Reflections on the Constitutional Justice of Livelihood*, 99 COLUM. L. REV. 1103, 1106 (1986). *Brown* stepped in the right direction. This is so despite the enforcement difficulties so patent from *Brown v. Board of Education (Brown I)*, 349 U.S. 294 (1955), onward, and even if *Bolling v. Sharpe*, 347 U.S. 497 (1954), relies on a double legal fiction in its theory that because the alternative was "unthinkable," the due process clause of the fifth amendment performed a reverse incorporation of equal protection doctrine from the fourteenth amendment and made *Brown* applicable to the federal government. *Id.* at 500.

in assessing judicial performance is how persuasive constitutional decisions seem to be, though we pay little attention to the question of who may actually constitute their audience. Finally, the actual results flowing from constitutional decisions are not thought entirely irrelevant.

A factor which seems virtually beside the point, however, is the issue of what actually motivated the judge. This is in part because we are aware that motives are mysterious, inherently subjective, and inevitably intertwined. But it means that we are hardly concerned with the very characteristic Fuller deemed central to distinguishing legal fictions from the rest of law.

B. The Dowager-Judge

That we have travelled a great distance to reach our present post-realist position is illustrated through a reconsideration of a particularly lucid section of Fuller's discussion of legal fictions. Fuller used a down-to-earth example to make his point. He described an elderly woman—I envision a dowager such as Margaret Dumont in the Marx Brothers movies—who decides to wear an out-of-style dress to a social gathering. Fuller suggested that the dowager's decision might be motivated by one of four reasons: (1) she may be making a statement of policy; (2) she may be reflecting her own emotional conservatism; (3) she may find it inconvenient to obtain a new dress; or (4) she may be intellectually limited.²⁵

Unsurprisingly, I perceive at least three basic problems when Fuller's categories are viewed from today's vantage point. First, as inhabitants of a post-realist legal landscape, we hardly accept the concept that categories of motivation can be isolated. Next, we perceive law generally to be riddled with out-of-date intellectual fashions. Finally, we have come to suspect that the dowager has no clothes. (There are those who try to peek beneath the latest fashions, and even some who suggest that there is no dowager, but such impolite people are rarely invited to social gatherings anyway.)

I do not mean, of course, to deny the utility of Fuller's "unprepossessing simile"²⁶ of the elderly woman. Fuller's trope fo-

²⁵ L. FULLER, *LEGAL FICTIONS*, *supra* note 6, at 56-64.

²⁶ *Id.* at 64.

cuses the question of what a judge is to do when he "find[s] himself forced to employ a fiction because of his inability to state his result in nonfictitious terms."²⁷ My point is rather that to post-realists, attention to what motivates the judge is as out-of-style as the dowager's dress, and the point Fuller seeks to isolate seems to defy isolation. It is as endemic today as it apparently seemed to be to Tocqueville in the 1830's. Moreover, the analogy of the dowager and the judge is most revealing for what it omits: the audience. The others in attendance, after all, are not able to tell from either the dowager's dress or from a judge's opinion which, if any, of Fuller's categories supplied the motivation for how she decided to act. Nor are we so impolite as to inquire about what the dowager-judge may have drunk for breakfast. The dowager-judge may not be aware of the phenomenon, but her audience may even believe that donning a red mini-skirt is making a statement so encrusted with nostalgia as to seem the height of fashion once again.

It might be thought that legal fictions ought to play a diminished role in constitutional law, in contrast to their prevalence in common law, for example. For one thing, constitutional law does not lack a text, whereas the common law "professes . . . to develop and apply principles that have never been committed to any authentic form of words,"²⁸ as Frederick Pollock put it. Despite the best efforts of interpretivists, originalists, and self-proclaimed strict constructionists, however, constitutional law as we know it—and as it has been from the start—demonstrates quite clearly that even our written "authentic form of words" requires additional criteria of construction and interpretation. In fact, we grow ever more doubtful about what sources we should consult, to say nothing of what might be thought authoritative. We lack any rule of recognition to distinguish constitutional truth from constitutional fiction. Moreover, our constitutional history clearly reveals that some sections of the authentic text have been relegated to limbo through non-originalist hierarchical principles while other sections have acquired so many levels of added meaning that it is now

²⁷ *Id.*

²⁸ F. POLLOCK, A FIRST BOOK OF JURISPRUDENCE 249 (3d ed. 1911), *quoted and discussed in* Simpson, *supra* note 9, at 16.

hard to discern any original shape beneath the layers of barnacles added over the years.²⁹

The constitutional text is manipulable, but that should not mean it is infinitely manipulable.³⁰ Federal judges have declared themselves less bound by *stare decisis* in the constitutional realm than they are in other domains, but they tend to remain concerned with the past and with their own places in history. Yet these same judges use legal fictions to purge the past of its blemishes and discontinuities.

There is a kind of ideological frontier thesis alive and well in constitutional law. Justices who start anew and never actually look back are applauded. Because they usually can find precedents readily and need not consider contexts at all, these judges reinforce us as we seek to turn our backs on past unpleasantness. We will not allow either past victims or victimizers to pierce the veil of important constitutional fictions. Fundamental assumptions in constitutional doctrine posit an America full of openings: we all can escape the sins of the past; we all enjoy a fair and equal start in the race of life.

Equality of citizenship, for example, is virtually always assumed, whether present in fact or not. This formal idea of equality generally will provide a complete defense against those who seek remedies for past discrimination unless they can demonstrate that the defendants actually violated the plaintiffs' equality—thus, the victim must place the defendant at the scene of past crimes.³¹ This was what the Supreme Court said when it considered race relations a century ago;³² it was true when the Court assumed the applicability

²⁹ Compare the fate of the ninth amendment and the privileges or immunities clause of the fourteenth amendment with the expansive interpretation of the eleventh amendment and the wildly varying permutations and combinations of interpretation of the due process clause of the fourteenth amendment.

³⁰ J. ELY, *DEMOCRACY AND DISTRUST* 112 (1980).

³¹ See, e.g., *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986) (school board's policy against layoffs of certain employees due to their race violates fourteenth amendment); *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (at-large elections do not unconstitutionally discriminate because everyone has equal access to registration and voting); *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979) (consideration of veterans ahead of non-veterans for civil service positions does not unconstitutionally discriminate against women if the preference now formally applies to both sexes equally).

³² See, e.g., *Baldwin v. Franks*, 120 U.S. 678 (1887); *Civil Rights Cases*, 109

of its version of liberty of contract before the New Deal;³³ and it is again generally true today.³⁴

In constitutional law, we are particularly devoted to the artificial doctrinal categories and tests that judges create. Often this is so even though we are at least subliminally aware, as Holmes put it, that a particular doctrine such as "affected with the public interest" may be "little more than a fiction intended to beautify what is disagreeable to the sufferers."³⁵ Judicial reliance on binary tests to foster the appearance of pseudo-certainty is not new, of course, as anyone who recalls the twilight zone of dual federalism or the power of liberty of contract imagery must acknowledge.³⁶ In constitutional cases today, however, judges seem to rely even more on the usual multipart formulae and many-pronged tests to convey that "delusive exactness"³⁷ which Justice Holmes both decried and sometimes practiced.

II. DRAWING AND CROSSING LINES: REAL FICTION, LEGAL FICTION

A. *Past and Prologue*

Legal fictions are quite different from real, literary fictions. For one thing, as Bob Cover pointed out, potential violence lurks beneath the fictions created by judges,³⁸ while the nexus between even

U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1883); *United States v. Reese*, 92 U.S. 214 (1875); *United States v. Cruikshank*, 92 U.S. 542 (1875).

³³ See, e.g., *Ribnik v. McBride*, 277 U.S. 350 (1928); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926); *Wolff Packing Co. v. Industrial Court*, 267 U.S. 552 (1925); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923); *Truax v. Corrigan*, 257 U.S. 312 (1921); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

³⁴ See *supra* note 31 and accompanying text.

³⁵ *Tyson & Brother v. Barton*, 273 U.S. 418, 446 (1927) (Holmes, J., joined by Brandeis, J., dissenting) (arguing that law restricting resale of theatre tickets was constitutional).

³⁶ See generally E. CORWIN, *THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY* (1934); F. FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* (1938).

³⁷ *Truax v. Corrigan*, 257 U.S. 313, 342 (1921) (Holmes, J., dissenting) (arguing established business not property constitutionally protected against union activity). For excellent recent treatments of the phenomenon, see Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985); Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 (1982).

³⁸ Cover, *supra* note 2, at 819-20.

the most powerful literary fiction and actual force is quite attenuated. Additionally, the author of real fiction enjoys more freedom than the creator of legal fiction. The literary creator usually tries to operate on multiple levels and even dreams of reaching a broad and varied audience. Writers of literary fiction also tend to acknowledge and even to use the possibility of complicity between the teller of the tale and the recipient of it, so that shared understanding is a core concern. By contrast, legal fiction employs a specialized shorthand; many creators and users of legal fiction intend their work product to be confined to, or even ignored by, a narrow audience of professionals.

Still, our literature illuminates the paradoxical American enthusiasm for bright lines and for bright individuals who cross those lines. Herman Melville's work often demonstrated his brilliant, almost preternatural ability to capture and explore this phenomenon. Melville also probed our propensity to ignore history and to applaud fresh starts, even while we insist on the weighty quality of the lessons of experience. Consider *Benito Cereno*,³⁹ for example. Melville published this profound novella as the nation spiraled toward the Civil War.⁴⁰ It is the tale of a slave revolt. Melville explores the naivete of a dichotomous view of the world and the moral conundrum in using violence to attack gross injustice. The American sea captain, Amasa Delano, is a remarkably complacent, unperceptive character; Melville ensnares his readers through their identification with Delano.

"Sappy Amasa," as Delano calls himself, is unable to imagine the possibility of a successful slave revolt. Delano's insistence on his own common sense helps blind him to what is really going on aboard the drifting Spanish slave ship. Intuitive assumptions and mistaken presumptions derived from popular science keep Delano from discerning that Babo and his fellow slaves are acting subser-

³⁹ H. MELVILLE, *Benito Cereno*, in BILLY BUDD, SAILOR AND OTHER STORIES 159 (F. Busch ed. 1986).

⁴⁰ *Benito Cereno* was first published in serial fashion in *Putnam's Monthly Magazine* (Oct.-Dec. 1855) and in book form as part of *The Piazza Tales* (1856). A good introduction to the heated political and legal atmosphere of the mid-1850's may be found in D. POTTER, *THE IMPENDING CRISIS, 1848-1861* (1976). See also S. CAMPBELL, *THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860* (1972).

viently to mask their successful uprising. Delano cannot perceive that they have unshackled the great chain of being, a basic element of the world view Americans used to rationalize slavery.⁴¹

Indeed, even after Delano stumbles into some awareness of the circle of reciprocal violence aboard the ship, he continues to be a naively optimistic American. He continues to believe he can readily distinguish black from white and good from evil. Delano even supposes that the bones of different races are distinctive. The following exchange takes place following the brutal suppression of the slave revolt by Delano's men: Delano seeks to cheer up the Spanish captain, Benito Cereno, whom he has just saved. Delano says, "But the past is passed; why moralize upon it? Forget it. See, yon bright sun has forgotten it all, and the blue sea, and the blue sky; these have turned over new leaves." Benito Cereno mournfully responds, "Because they have no memory . . . because they are not human." Delano still cannot understand such a brooding, European sense of tragic history: "'You are saved,' cried Captain Delano, more and more astonished and pained, 'You are saved: what has cast such a shadow upon you?'" Benito Cereno responds, "'The Negro.'"⁴²

Whatever targets he might have intended—Melville might have been motivated by the need to confront his own genealogy, his disappointment at the lack of perception and appreciation for his own work by most American readers, or his desire to comment upon the general blindness surrounding the unravelling of American law and politics in the mid-1850's⁴³—Melville brilliantly elucidated

⁴¹ Once free, ironically, the former slaves immediately limit their freedom, this time through a formal contract: they exchange the lives of surviving whites on board the ship they have taken for passage to Senegal and the right to retain the ship and its cargo. H. MELVILLE, *supra* note 39, at 242. Melville also employs the curious device of a lengthy legal deposition for a number of reasons which provide great ironic power. As in his description of the relationship of the lawyer and the scrivener in *Bartleby*, Melville operates on many levels in his examination of the forms and fetters of freedom. See H. MELVILLE, *Bartleby*, in BILLY BUDD, SAILOR AND OTHER STORIES, *supra* note 39, at 1.

⁴² H. MELVILLE, *supra* note 39, at 257.

⁴³ For a provocative and insightful psychobiography of Melville, which emphasizes his family's decline and the role of lawyers within it, see M. ROGIN, *SUBVERSIVE GENEALOGY: THE POLITICS AND ART OF HERMAN MELVILLE* (1983). Melville's dismay over the reception of *Moby Dick* and the work that followed is mentioned

collective unconsciousness in *Benito Cereno*. Through Amasa Delano, Melville skewered American amnesia about the binding quality of the past. In contrast to Shakespeare's visitors to Caliban's mystical New World island in *The Tempest*,⁴⁴ for whom "what's past is prologue,"⁴⁵ Americans seem devoted to Delano's faith that the past is passed. Melville has captured an exemplary American spirit. We seek constantly to ignore the problematic past and to celebrate fresh beginnings in politics and in law as well as in literature.

Simultaneously, we like to claim continuity and yearn for certainty in our law. We are not willing to confront the contraries⁴⁶ in our legal history. In fact, we tend to revere precisely those judges who are most adept at maintaining the seemly facade of seamlessness as they develop the law. Our great judges are those who most effectively use the fabric of fiction to camouflage their creativity.⁴⁷ This is problematic, to say the least, in a democracy. Those very judges strain our commitment to rule by the people, not by a clever elite.

B. Principles, Practices, and Happy Endings

In our quest for certainty and in our need for optimism, even at the expense of history, realism, and compassion, we perpetuate

by nearly everyone who discusses Melville, although John Updike challenges the commonplace view that Melville and other American authors of this era suffered from deplorable economic and psychological conditions. See J. UPDIKE, *Melville's Withdrawal*, in HUGGING THE SHORE: ESSAYS AND CRITICISM 80 (1983). For Melville's general view of politics and race during the 1850's, see M. FISHER, *GOING UNDER: MELVILLE'S SHORT FICTION AND THE AMERICAN 1850'S* (1977); C. KARCHER, *SHADOW OVER THE PROMISED LAND: SLAVERY, RACE AND VIOLENCE IN MELVILLE'S AMERICA* (1980); Bollinger, *The Homer of the Pacific: Melville's Art and the Ambiguities of Judging Evil*, 75 MICH. L. REV. 823 (1977).

⁴⁴ W. SHAKESPEARE, *THE TEMPEST* (F. Kermode ed. 1958).

⁴⁵ *Id.* at 56.

⁴⁶ William Blake once wrote, "Without Contraries is no progression." W. BLAKE, *The Marriage of Heaven and Hell*, in COMPLETE WRITINGS OF WILLIAM BLAKE 149 (G. Keynes ed. 1972). But see H. MAINE, *supra* note 14, at 25.

⁴⁷ Even a commentator as curmudgeonly as Grant Gilmore celebrated Justice Benjamin Cardozo, for example, as "a truly innovative judge" who "was accustomed to hide his light under a bushel." G. GILMORE, *supra* note 16, at 75. Gilmore continued, "The more innovative the decision to which he had persuaded his brethren on the court, the more his opinion strained to prove that no novelty—not the slightest departure from prior law—was involved." *Id.* Gilmore noted that Cardozo accomplished this feat "with a masterly elegance." *Id.*

an American anomaly which stretches well beyond legal analysis. A century ago Mark Twain provided what is probably still the best example of the American propensity to use fictions to preserve formal principles.⁴⁸ In *The Adventures of Huckleberry Finn*,⁴⁹ Twain parodied our compulsion to keep the faith in happy endings. In Twain's acerbic commentary on race relations, published in the immediate wake of the big lie embedded in the *Civil Rights Cases*,⁵⁰ we find the following, surely one of the most extraordinary snippets in all of American literature. Huck has made up a story to help convince Aunt Sally that he is really Tom Sawyer:

"We blowed out a cylinder-head."

"Good gracious! Anybody hurt?"

"No'm. Killed a nigger."

"Well, it's lucky; because sometimes people do get hurt."⁵¹

Somewhat less well-known, as well as less well-crafted, is what happens after Tom himself arrives. In describing the attempt by Huck and Tom to rescue Jim, who has been imprisoned as a runaway slave, Twain captured the American fascination for playing by the rules even when forced to break them.

Huck and Tom are trying to dig a tunnel to free Jim from the cabin where he is confined. Tom knows from reading romantic

⁴⁸ To the best of my knowledge, Roscoe Pound was the first to make use of Twain to illustrate the functioning of legal fictions. He did so to introduce Pound, *Law in the Books and Law in Action: Historical Causes of Divergence Between the Nominal and Actual Law*, 44 AM. L. REV. 12, 12-13 (1910).

⁴⁹ M. TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* (W. Blair & V. Ficher eds. 1985).

⁵⁰ 109 U.S. 3 (1883).

⁵¹ M. TWAIN, *supra* note 49, at 279.

In recent years, there has been controversy once again over Samuel Clemens' racial views. In 1985, for example, *Huckleberry Finn* was removed from a required reading list in Waukegan, Illinois, after charges were made that it was racist. Dr. John H. Wallace, a black educator employed by the Chicago School Board, launched a national campaign against the book, arguing that it should be burned as "the most grotesque example of racist trash ever written." These incidents, and the authentication of a letter from Clemens which detailed his offer to provide financial assistance to one of the first black law students at Yale Law School, Warner T. McGuinn, are reported in McDowell, *From Twain, a Letter on Debt to Blacks*, N.Y. Times, Mar. 14, 1985, at 1. In this letter to the dean of the law school, Clemens stated, "We have ground the manhood out of them, & the shame is ours, not theirs, & we should pay for it." *Id.*

literature that one must use case-knives for such an adventure. "It's the right way—and it's the regular way. And there ain't no *other* way," Tom says.⁵² But after a few hours of digging, Tom and Huck are blistered and exhausted. According to all of Tom's books, this should be a thirty-seven year job, but Huck now thinks it looks like a thirty-eight year job. Tom says, "Gimme a case-knife," and Huck tells us:

He had his own by him, but I handed him mine. He flung it down and says "Gimme a *case-knife*."

I didn't know just what to do—but then I thought. I scratched around amongst the old tools and got a pickaxe and give it to him, and he took it and went to work and never said a word.

He was always just that particular. *Full of principle*.⁵³

So much for ends and means; so much for the use and abuse of principles. Only a fiction, finally understood as such by Huck, permitted Tom to be true to the principled constraints he derived from books and to be pragmatic as well. On another level, however, it is significant that the reason an upstanding fellow such as Tom Sawyer is willing to free Jim is that Tom knows old Miss Watson's will already had set Jim free.⁵⁴ In his rush toward a happy ending for a book the author as well as his narrator seemed "rotten glad" to finish,⁵⁵ Twain actually helped obscure a revealing twist in American law in the books and in action. In many jurisdictions before the Civil War, Miss Watson's posthumous attempt to free Jim would not have been considered valid.

The law of Missouri before the Civil War on the question of a slave owner's ability to free a slave in her will was and remains somewhat obscure; it was hardly clarified by the treatment of re-

⁵² M. TWAIN, *supra* note 49, at 304.

⁵³ *Id.* at 307. Clemens' father, one John Marshall Clemens, was a lawyer in Kentucky, Tennessee, and, after many failures, in Missouri, where he became a county judge and, in Hannibal, a justice of the peace. See Roam, *Mark Twain: Doctoring the Laws*, 48 Mo. L. REV. 681, 683-89 (1983) (discussing the connections between Twain and law, life and literature).

⁵⁴ M. TWAIN, *supra* note 49, at 357.

⁵⁵ *Id.* at 362.

lated issues concerning a slave in Missouri in *Dred Scott v. Sandford*.⁵⁶ But restrictions and prohibitions against the freedom of slave owners to free, and even more so to provide for, their former slaves, were numerous and far-reaching.

Consider, for example, a Georgia case involving Pierce Bailey's will.⁵⁷ Bailey, who was killed during the Civil War, certainly was no prize himself. Indeed, Bailey was enough of a scoundrel to get himself convicted of voluntary manslaughter for killing one of his own slaves in the 1850's.⁵⁸ But the important point about Bailey

⁵⁶ 60 U.S. (19 How.) 393 (1857); *see generally* D. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978). Actually, Missouri was more liberal than many Southern states about the power of masters to emancipate slaves in the years before the Civil War. *See, e.g.*, *Milton (of color) v. McKarney*, 31 Mo. 175 (1860) (will conditioning emancipation on slave's emigration to Liberia upheld despite failure to provide security); *Schropshire v. Loudon*, 22 Mo. 393 (1856) (a will not yet probated could operate as a valid instrument for emancipation). *But see* *Redmond (of color) v. Murray*, 30 Mo. 570, 575 (1860) (executory contract for slave's purchase of his freedom void, since "manumission is a mere gratuity under our laws").

The Missouri courts also did not follow the harsh rule, summarized in T.R.R. COBB, *LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* (1858 & photo. reprint 1968), that "the slave is entirely deprived" of "the other great absolute right of a freeman, viz., the right of private property." *Id.* at 235. *Compare* *Douglass v. Ritchie*, 24 Mo. 177, 180 (1857) *with* *Folden v. Hendrick*, 25 Mo. 411, 414 (1857) (disputing the extent to which custom might overcome *de jure* prohibitions on slave capacity).

Perhaps the most unusual Missouri slave case in the 1850's was *Beaupied v. Jennings*, 28 Mo. 254 (1859), which upheld a will conferring a privilege upon a slave through a trustee to find a new master to purchase her if the slave was dissatisfied with the mistress who inherited the slave. The Missouri Supreme Court regarded this arrangement as not inconsistent with slavery and found it in keeping with

[t]he relation between master and slave . . . regulated by a variety of laws, all having in view to enforce their reciprocal rights and duties, obedience and submission on the one hand and protection and kindness on the other; and although these rights and duties, to some extent, like those of parent and child, can, from their very nature, be enforced but imperfectly, yet their existence and validity is recognized, and any deviation from them is punished in the same way and to the same extent as a dereliction of other moral obligations.

Id. at 258.

⁵⁷ *Cobb v. Battle*, 34 Ga. 458 (1866).

⁵⁸ *See* *Bailey v. State*, 26 Ga. 579 (1858) (earlier decision setting aside jury verdict of manslaughter did not bar new trial; opinion includes discussion of federal constitutional claims); *Bailey v. State*, 20 Ga. 742 (1856) (1856 legislation that enlarged class qualified for service on criminal juries applied to offense

and the law is that even after the Civil War and passage of the thirteenth amendment, the Georgia Supreme Court believed it necessary and appropriate to invalidate Bailey's attempt to provide a \$20,000 trust for his slave mistress and the child he fathered.

The Georgia Supreme Court was surprisingly willing to speak ill of the deceased. The unanimous court described Bailey as "an old-money-lender . . . avaricious . . . whose sole ambition was accumulation."⁵⁹ Moreover, Bailey was a person whose "attachment to his kindred . . . appears to have been weak"; a nephew who witnessed daily doings at Bailey's house was said to have "nosed daily the filthy sty."⁶⁰ Yet the court conceded that Bailey's intentions were clear. Moreover, there was no doubt as to his mental competence when he made his will in 1861. Justice Harris' opinion stated what Bailey intended to say about his slave mistress and child as follows:

[T]heir future is to be as uncontrolled as it has been; I raised Adeline to an equality with me; she became my mistress, shared my bed, is the mother of my child; she has my entire confidence, rules and orders my house, and bears the insignia of the wife in her girdle; they have my love, and demand my care for them in the future.⁶¹

The Georgia Supreme Court determined, however, that Bailey's will violated the Georgia law in force when it was written. That law restricted manumission, and therefore the will could not be enforced. Conceding that the abolition of slavery in 1865 "swept away, at a blow, all laws in reference to negroes as slaves" and that "their freedom began then,"⁶² the court nevertheless held that this new constitutional language did not relate back to prior legal arrangements.⁶³ Accordingly, Bailey's slave mistress and child lost

committed before passage; new trial ordered using legislation's jury selection technique). Bailey was apparently a rather litigious fellow. *See, e.g., Bailey v. Barnelly*, 23 Ga. 582 (1857) (action in assumpsit on an account for blacksmith work done by slave owned by Bailey).

⁵⁹ *Cobb v. Battle*, 34 Ga. at 482.

⁶⁰ *Id.* at 481.

⁶¹ *Id.* at 477.

⁶² *Id.* at 483.

⁶³ *Id.*

the money and posthumous care Bailey sought for them.

Lest this rigid view of Bailey's will be considered an isolated example, there are numerous other Georgia cases⁶⁴—and even more spectacular examples in other states,⁶⁵ as well as in United States Supreme Court applications⁶⁶ of *Swift v. Tyson*⁶⁷—which demonstrate similar use of everyday legal doctrines to confine or reject the freedom guaranteed in the thirteenth amendment. The mood of the leaders of the Georgia legal community is perhaps best captured in rhetorical flourishes found in opinions by Chief Justice Lumpkin.⁶⁸ In an 1866 case of trover involving a former slave, for

⁶⁴ See, e.g., *Scott v. State*, 39 Ga. 321 (1869) (anti-miscegenation law upheld and segregation approved); *Whitley v. State*, 38 Ga. 50 (1868) (no error where solicitor general and defense counsel agreed to exclude all black jurors); *Williams v. Waters*, 36 Ga. 454 (1867) (parol evidence rule used to foreclose tenant farmer's claims).

⁶⁵ See, e.g., *Barrow v. Heirs of Bird*, 22 La. Ann. 407 (1870) (court refuses to enforce legacy granted bastard children of master); *Calhoun v. Calhoun*, 2 S.C. 283 (1870) (strict imposition of obligation of contracts to disallow abatement for prior debts); *Blakely v. Tisdale*, 14 S.C. Eq. (3 Rich. Eq.) 90 (1868) (1822 will emancipating slaves and devising land held invalid).

⁶⁶ See, for example, the quartet of decisions written by Justice Swayne in 1871 proclaiming the enforceability of promissory notes given for purchases of slaves, including *White v. Hart*, 80 U.S. (13 Wall.) 646 (1871), and *Osborne v. Nicholson*, 80 U.S. (13 Wall.) 654 (1871) (both emphasizing federal courts' obligation to ensure stability of contracts). See generally *Dawson & Cooper, The Effect of Inflation on Private Contracts: United States, 1861-1879*, 33 MICH. L. REV. 706, 852 (1935).

⁶⁷ 41 U.S. (16 Pet.) 1 (1842).

⁶⁸ The most dramatic example is probably an appeal from a murder conviction by Carter Heard, denominated as a person of color. Writing for a unanimous Georgia Supreme Court, Chief Justice Lumpkin said:

I have lost faith very much in punishment, as a means of amending the offender himself. Its reformatory effect is not much, I fear; still its punitive power must be felt; and while the glittering blade, wielded by the strong arm of malice, is mighty to destroy, still, the small cord, in the hands of the executioner of justice, must be felt to be not less fatal and unerring.

This is an age of Cains, and the voices of murdered Abels come up at every Court, crying aloud to the ministers of the law for vengeance. Let the stern response going out from the jury box and the bench be, whoso sheddeth man's blood without legal excuse or justification, shall be hung by the neck till he is dead.

Heard, (a person of color) v. State, 35 Ga. 158, 169-70 (1866).

For an important discussion of a number of Lumpkin's antebellum opinions, see M. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1818-1860* (1981). For biographical data on Lumpkin, see Nash, *Reason of Slavery: Understanding the*

example, Lumpkin proclaimed: "manumission is not only a *two-edged* sword, but rather like the flaming sword placed at the East of the garden of Eden, at Adam's expulsion, *turning every way* towards the community."⁶⁹

The law of the community limited the freedom of even the "free" individual both before and after the Civil War. Judges could limit it further and might go beyond what the legislature provided to do so. Yet surely most white male Americans wanted to think of themselves as entirely free to contract for, hold, and devise property as they saw fit. The rhetoric surrounding legal doctrine from the middle to the end of the nineteenth century tended to reinforce their beliefs. It is important to note that the manipulation of what we now might well consider legal fictions nurtured this paradox.

It is not obvious, to be sure, on what basis a judge should have decided what the effect of emancipation on prior law should be. Decisions about whether and to what extent new law relates back to prior legal arrangements traditionally provide common ground for legal fictions to flourish. A paradigm of legal fiction, for example, is the doctrine of relating back in property law. But in the context of the Civil War and its aftermath, the presumption of a continuous fabric of legal relations was ripped apart. Nothing in the language of the United States Constitution, statutes, nor other traditional sources of law could really answer the question of what the new freedom meant to former slaves and former masters. Moreover, we can guess that carpetbag judges held views on such mat-

Judicial Role in the Peculiar Institution, 32 VAND. L. REV. 7, 104-22 (1979). A useful old-style history of Reconstruction in Georgia is C. M. THOMPSON, RECONSTRUCTION IN GEORGIA: ECONOMIC, SOCIAL, POLITICAL, 1865-1872 (1915); a modern retelling is E. NATHAN, LOSING THE PEACE: GEORGIA REPUBLICANS AND THE RECONSTRUCTION, 1865-1871 (1968). See generally L. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 260-91 (1979) (a brilliant kaleidoscopic description of the complex reactions to the end of slavery, including violence both within and outside the law).

⁶⁹ *Riley v. Martin*, 35 Ga. 136, 139 (1866) (action for trover will lie for slave converted prior to emancipation) (emphasis in original). There were decisions both ways on the race question, of course, particularly in the period of most vigilant Reconstruction oversight. See, e.g., *Clarke v. State*, 35 Ga. 75, 82 (1866) (blacks competent witnesses in jury trial involving whites); *Comas* (a person of color) v. *Reddish*, 35 Ga. 236, 237-38 (1866) (*habeas corpus* granted former slave to free his son from coerced apprenticeship, noting that "slavery is with the days beyond the flood").

ters very different from those of unreconstructed southerners and that black juror and white juror might reach different results. It was in this context, against the background of the incomparable discontinuity of the Civil War, that the United States Supreme Court chose to help lead the way back to "normalcy." Through aggressive deployment of what they considered to be pragmatic continuity, the justices proclaimed a need to keep the faith in what they asserted were long-established principles such as federalism, the separation of public and private spheres, and the obligations of contract law for all who were *sui juris*.⁷⁰

This theme of continuity, this claimed return to first principles, allowed the Court during the tenures of Chief Justices Chase and Waite to abrogate almost entirely the constitutional and statutory products of the War, the thirteenth through fifteenth amendments, and the various civil rights statutes passed during the decade which ended with the Civil Rights Act of 1875.⁷¹ Taken case by well-known case, decisions such as those in the *Slaughter-House Cases*⁷² and the *Civil Rights Cases*⁷³ seem illogical. Yet for all their peculiarities, their fictions have become crucial links in mainstream constitutional law.

Taken together, these decisions and a host of lesser-known decisions illustrate the Court's propensity to share Amasa Delano's naive faith. Pragmatic fictions eliminate the past and shroud the tragedy of present reality. And beyond a host of decisions eviscerating civil rights protections, the Court's enthusiasm to extend *Swift v. Tyson* and to employ Langdellian geometry to create and nurture contract law principles provides an instructive illustration of the triumph of fictions over facts, formalism over realism.⁷⁴

⁷⁰ See generally Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 L. HIST. REV. 247 (1987).

⁷¹ See generally L. MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* (1966); D. NOVAK, *THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY* (1978); Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History* (Review Essay), 54 N.Y.U. L. REV. 651 (1979).

⁷² 83 U.S. (16 Wall.) 36 (1873) (sharply distinguishing national and state citizenships and interpreting the privileges or immunities clause of the fourteenth amendment to be a virtual nullity).

⁷³ 109 U.S. 3 (1883) (imposing "state action" limitation for fourteenth amendment purposes, premised in part on assumption that state laws would enforce equal access to public accommodations).

⁷⁴ See Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Soifer, *supra*

It remains difficult, however, to isolate legal fictions and formalism. The next sections contemplate what James Boyd White seems to celebrate, and Robert Cover to condemn, so that we may be better able to assess current use and abuse of legal fictions. Even if we come to embrace what certain judges write as examples of community-building discourse, we should not lose sight of Cover's warning about iron lurking beneath even the best judge's velvety rhetoric.

C. *Flavors, Facts, and Fictions*

James Boyd White has been, as Holmes might have put it, the preceptor for many of us in how to approach the language of law.⁷⁵ He urges us to develop techniques to do criticism of judicial opinions;⁷⁶ most recently, he has instructed us about how we should read classic texts and legal texts ranging from Aeschylus to the rules for corporate governance proposed by the American Law Institute.⁷⁷ It was thus an additional treat last March to hear White recreate Chief Justice Taft's harumphing style and remind us of Brandeis' stirring dissent in *Olmstead v. United States*.⁷⁸

In *Olmstead*, Taft's opinion for a 5-4 majority upheld a federal conviction for violation of the Prohibition Act, despite the fact that the federal authorities obtained evidence by wiretapping, which

note 70; see generally S. FINE, *LAISSEZ-FAIRE AND THE GENERAL-WELFARE STATE* (1956); R. McCLOSKEY, *AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE, 1865-1910* (1951); B. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* (1942).

⁷⁵ Indeed, the current fascination with modes of interpretation in legal academia may be traced in large measure to the influence, direct and subtle, of J.B. WHITE, *THE LEGAL IMAGINATION* (1973), on those now maturing into positions to set the fashions in legal academia. One should not discount various other influences, of course, such as a desire by some to keep up with European intellectuals, the need felt by some to establish a redoubt from which to counterattack the law and economics crowd, and, for some, a base to defend against Critical Legal Studies. See generally Heller, *Structuralism and Critique*, 36 *STAN. L. REV.* 127 (1984).

⁷⁶ See White, *supra* note 1.

⁷⁷ White has been impressively prolific in recent years. See, e.g., J.B. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985) [hereinafter cited as J.B. WHITE, *HERACLES' BOW*]; J.B. WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984) [hereinafter cited as J.B. WHITE, *WHEN WORDS LOSE THEIR MEANING*]; White, *How Should We Talk About Corporations? The Language of Economics and of Citizenship*, 94 *YALE L.J.* 1416 (1985).

⁷⁸ 277 U.S. 438 (1928).

was unlawful under Washington state law.⁷⁹ The case led to Brandeis' inspiring essay about the spiritual as well as material aspects of personhood, about privacy, and about the need to check illicit government means towards even beneficent government ends.⁸⁰ White uses *Olmstead* to guide his audience toward considering how to read the Constitution—how to translate the constitutional text by considering “what has been, what is, and what shall be.”⁸¹

Despite the force and elegance of White's approach, I continue to find it somewhat troubling. I am not disturbed by White's claim that opinions are inseparable from results in constitutional law. If he were mistaken about that, in fact, most of us who teach and write about constitutional law would lose a great chunk of our market share. Nor are my own sympathies anywhere but emphatically alongside White on Brandeis' team in the *Olmstead* debate. Finally, White is surely accurate in his criticism of Taft's majority opinion for its “blunt and unquestioning finality,” its “self-evident circularity,” and its use of the judicial voice as “authoritative, unquestioning and unquestionable.”⁸²

What concerns me, however, is White's idealistic institutionalist faith. White is so delighted with his image of Brandeis as teacher, for example, that the possibility that Brandeis' students are in attendance only because school is compulsory never bothers him. And White does not seem to recognize that even an excellent teacher sometimes may be obliged to appear “authoritative, unquestioning and unquestionable.” In pedagogy, the question often is when, rather than whether, to play “intermediate boss,”⁸³ a role White severely attacks Taft for playing. As I hope to demonstrate, Brandeis-the-teacher played precisely that role, and did so with considerable brilliance in his *Olmstead* dissent. Indeed, it is always a tricky thing for a teacher to try to convey values while simultaneously educating students to think for themselves. It is stickier still when the teacher claims the authority of law for his views.

Brandeis' language is so powerful, in fact, that even an acute

⁷⁹ *Id.* at 469.

⁸⁰ *Id.* at 471 (Brandeis, J., dissenting).

⁸¹ See White, *supra* note 1, at 861.

⁸² *Id.* at 856.

⁸³ *Id.* at 853.

reader such as White either does not see, or chooses to ignore, the rabbit flopping in and out of Brandeis' hat. I do not believe White can sustain his claim that Brandeis' opinion is "different in almost every respect"⁸⁴ from Taft's opinion. Like Taft, Brandeis places value "in the fact of authority, in the reduction to simplicity, in the 'no nonsense' voice, in the very control, acquiesced in by his reader, over the facts and the language of the case."⁸⁵

Nearly every teacher learns how hard it is to know which student should be the target as one pitches the lesson. Awareness of the nettlesome issue of defining the appropriate audience helps us look beneath the surface of Brandeis' *Olmstead* opinion. It is particularly appropriate to do so because the dilemma of how much universal compulsory education to have, and of what sort, underscores a central paradox within efforts by Progressives such as Brandeis to remake or reform society. If people who are less well off are to be instructed and uplifted for their own good, is their intelligent, knowing, and voluntary consent to be a prerequisite for reforms premised on faith in skilled scientific management and social engineering? If paternalism is permissible—even at times necessary—who decides how much and when proper paternalism should be invoked to transform individuals and, through them, society?

These knotty issues are still with us, of course, albeit in slightly different guises. Faith in dialogue and even sophisticated community response brought about through close attention to great texts seem unlikely to settle or even successfully mediate zero-sum problems in an ongoing and often angry debate about the future. Despite all the admiration due Brandeis' *Olmstead* dissent, within it lurk several variations on the theme of the skilled rhetorician's ability to manipulate, perhaps even to hornswoggle, his audience.

Attention to legal fictions may help us identify a few illustrative anomalies within Brandeis' great text. Moreover, if we move beyond *Olmstead* to other Brandeis opinions or pay close attention to the context of *Olmstead*, we discover the ways Brandeis' great essay fails to approach what White describes as "at the heart of what we mean by justice."⁸⁶ "Justice involves," White says, "ques-

⁸⁴ *Id.* at 857.

⁸⁵ *Id.* at 856.

⁸⁶ J.B. WHITE, HERACLES' BOW, *supra* note 77, at 134.

tions of character and relationship and community . . . in who we are to each other."⁸⁷ Yet Brandeis elevates the right to be let alone, even as he worries about the dangers of an inert people and the role of government as teacher.

White does not supply us with adequate criteria to understand why he condemns Taft's opinion in *Olmstead* as a conversation "that is not the beginning but the end of democracy,"⁸⁸ in contrast to Brandeis' opinion, which White says exemplifies the beginning of democratic conversation. Indeed, White has suggested that the best work of Justice Harlan or of Justice Brandeis⁸⁹ most nearly approximates the possibilities for greatness in judicial opinions. White never says so directly, but he seems to use Brandeis' *Olmstead* dissent as an exemplar of the approach to his ideal.

My doubts about White's enthusiasm for Brandeis' translation of the Constitution begin, I think, on a more basic level than the usual law professor's proclivity to pick nits and to exercise what Alan Stone once diagnosed as "hypertrophy" of the critical senses.⁹⁰ White's appealing idealism about education and democracy does not seem consistent with the role of the appellate judge in our society generally or with Brandeis' chosen voice in *Olmstead* specifically. Several internal inconsistencies in Brandeis' opinion should have undermined White's faith. It is problematic to consider even this great dissent "a central and essential means" to democratic "intellectual and moral self-improvement."⁹¹ Brandeis' creation of legal fictions is too blatant; his history is too romantic and anti-septic; his rhetorical flourishes hide too many holes. There is too much of Amasa Delano and Tom Sawyer in Brandeis' approach to history and his self-proclaimed devotion to principle.

White urges us to move through stages of cultural, literary, ethical, and political considerations in our readings, but he has a more limited agenda in his *Olmstead* discussion. We are still, White instructs, to consider the "conversational community"⁹² that the opinions

⁸⁷ *Id.*

⁸⁸ White, *supra* note 1, at 857.

⁸⁹ J.B. WHITE, HERACLES' BOW, *supra* note 77, at 242.

⁹⁰ Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 403 (1971).

⁹¹ White, *supra* note 1, at 867.

⁹² *Id.* at 847.

by Taft and Brandeis help create. I, too, wish for a language of legal criticism. The need to use words to reconstitute reality is our challenge. But I want to probe why White and I read Brandeis so differently, yet share admiration for Brandeis' example of expounding the Constitution: in short, what makes Brandeis' *Olmstead* dissent great?

White is an expert reader and he likes Brandeis' way with words, yet White urges us to read for ourselves. To take his word for what is good or great would be inconsistent with the non-hierarchical image of conversational community White elsewhere conveys, and would not help us choose among experts who read actively and differently. Others, for example, whose readings are surely admissible to White's communities, seem to favor efficient enforcement of criminal laws over the claims to be let alone by people who may lack character or even be in "the criminal element." Apparently, that was the view of the temporary community, the jury, in the *Olmstead* trial.

Moreover, White probably would join me in condemning an expansive contemporaneous constitutional technique, quite similar to that employed by Brandeis in *Olmstead*, which used presumed values of the Framers to invalidate laws against child labor⁹³ and to strike down progressive social regulation.⁹⁴ Yet Brandeis invoked such a technique to recognize claims by Roy "Big Boy" Olmstead, a former lieutenant in the Seattle police force who had become the leading bootlegger in western Washington.⁹⁵ How one distinguishes between the ideals of *laissez-nous faire* ("let us alone") and Brandeis' "right to be let alone" is hardly obvious. Indeed, Brandeis' own ambivalence on the matter is more meaningful when one recognizes with White that a constitutional opinion may do much more than decide an individual case. The opinion itself—including its authoritative pronouncement—may play a role in constituting a community.

⁹³ See, e.g., *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

⁹⁴ See, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908); *Lochner v. New York*, 198 U.S. 45 (1905).

⁹⁵ See W. MURPHY, *WIRETAPPING ON TRIAL: A CASE STUDY IN THE JUDICIAL PROCESS* 16 (1965) (a vivid case study of *Olmstead*). Curiously, White does not cite Murphy's book.

D. Thoughts On Not Letting Olmstead Alone

White concedes that his vision of democracy does not entail majoritarianism as a referendum might, but is instead an ineffable sense empowering us to "build, over time, a community and a culture that will enable us to acquire knowledge and to hold values of a sort that would otherwise be impossible."⁹⁶ This rather open-ended definition of democracy is premised on ordinary language, open to those who learn its terms, and, most importantly, it requires recognition that "essential conditions of human life"⁹⁷ are shared by all. Despite its supposed democratic roots, however, there is a powerful strand of somewhat elitist Burkean organicism in this, which will not surprise those who have read White's discussion of Edmund Burke.⁹⁸ There is also a lush vagueness about the "essential conditions of human life" White believes necessary to members of his community. In fact, as any specific discussion of "the right to be let alone" demonstrates to this day, there are apt to be irreconcilable differences about when an intrusion for the greater good may be justified. Therefore, as views of the matter change over time, there is elitism inherent in according a judge with life-long tenure the power to instruct on such matters, particularly when to do so he must reject the views of a temporary community, the jury.

White also acknowledges that an active reader necessarily imports personal views into the reading of texts such as *Olmstead*. We can better understand White and his tolerance, even his admiration, for Brandeis' creativity⁹⁹ by briefly considering specifically what Brandeis wrote in his *Olmstead* dissent.

First of all, Brandeis appears certain of his own ability to iden-

⁹⁶ White, *supra* note 1, at 867.

⁹⁷ *Id.* at 868.

⁹⁸ J.B. WHITE, WHEN WORDS LOSE THEIR MEANING, *supra* note 77, at 192-230.

⁹⁹ James Boyd White is a savvy fellow, of course, and in passing he does supply caveats about how Brandeis may have had a somewhat romantic view of the Framers; may have invoked principles in a somewhat "simple-minded" way; may have applied them in a way that is more than a bit "authoritarian"; and may have been inadequately respectful of actual constitutional language. White, *supra* note 1, at 853. But White merely mentions these problems *en passant*, and does not relate them to the "essential equality" he believes a case establishes between people. J.B. WHITE, WHEN WORDS LOSE THEIR MEANING, *supra* note 77, at 274.

tify "the most comprehensive of rights and the right most valued by civilized men," which is "the right to be let alone."¹⁰⁰ Defined this way, the right seems to demand recognition because to fail to recognize it is to run the risk of being uncivilized. Brandeis' distinction between civilized men and others suggests a rather low view of the majority of his brethren, but it also might have surprised many who were not among "the best men."¹⁰¹ Others might assign higher values to minimal food, health care, safety, employment, education, or the vote. Immigrant families crowded into urban slums, for example, were forced to vote with their feet in ways inconsistent with Brandeis' view of civilized conduct.

More important than skepticism about Brandeis' hierarchical claim for the right to be let alone, for our purposes, is close scrutiny of how Brandeis explains its derivation. Brandeis asserts that the right to be let alone was "conferred"¹⁰² upon the American people. By whom? Brandeis says it was conferred by "[t]he makers of our constitution [who] undertook to secure conditions favorable to the pursuit of happiness."¹⁰³

This is all we learn about the givers of our basic rights, rights which Brandeis emphasizes are spiritual as well as material. Thereafter, Brandeis launches a string of sentences beginning with the

¹⁰⁰ *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

¹⁰¹ For discussions of the patrician background of the famous Warren and Brandeis article, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), see J. SPROAT, "THE BEST MEN": LIBERAL REFORMERS IN THE GILDED AGE (1968); Barron, *Warren and Brandeis, The Right to Privacy*, 4 HARV. L. REV. 193 (1890): *Demystifying a Landmark Citation*, 13 SUFF. L. REV. 874 (1979); Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892 (1981). The famous phrase, "the right to be let alone," is usually traced through Thomas Cooley and E. L. Godkin to the thought and phrase-making of John Stuart Mill. As Calabresi notes, however,

[o]ther values, such as privacy and rights to one's own body, have been mentioned. I think most statements of the issue in terms of those rights alone tend to be misleading. We have not in our law had any consistent pattern of constitutional rights to our own bodies or to privacy in sexual matters that seems to exclude governmental regulations.

G. CALABRESI, IDEALS, BELIEFS, ATTITUDES, *supra* note 9, at 100.

¹⁰² *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

¹⁰³ *Id.*

pronoun "they,"¹⁰⁴ reinforcing a notion of a unified, mystical, noble band of Constitution-makers. This approach allows Brandeis to merge the Fathers sacerdotally with their heirs and assigns. It provides misty, filiopietistic unity. He does not take into account either specific historical battles over the fourth amendment or the myriad ways in which laws, regulations, and hierarchical customary systems did anything but leave people alone in 1787 or 1791.¹⁰⁵

Instead, Brandeis uses a phrase from the Declaration of Independence to identify a constitutional right,¹⁰⁶ and lumps the constitutional product of 1787 with the Bill of Rights,¹⁰⁷ which followed several more years of acrimony. Apparently, in Brandeis' view, all those engaged in constitutional drafting, debating and ratifying from 1787 through 1791—and perhaps those who counted in 1776 as well—are to be considered within the noble group who conferred on Americans rights requisite for civilization.

In creating this glowing vision of the Constitution, Brandeis is not bothered by history. Footnotes might undercut his romantic faith. Revered as a lover of facts, Brandeis almost surely knew better. The passionate debate that followed the publication of Charles Beard's famous historical study of the Constitution in 1913,¹⁰⁸ for

¹⁰⁴ *Id.* This contrasts with John Marshall's assumption that not only "the people," but also the Framers, were part of the "we" in whose voice he chose to speak. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324 (1819). White offers a provocative reading of *McCulloch* in J.B. WHITE, WHEN WORDS LOSE THEIR MEANING, *supra* note 77, at 231-274. Perhaps this difference reveals an element of self-consciousness about "emargination" on the part of Brandeis, the first Jewish Justice; perhaps it is due merely to the passage of time or stylistic differences.

¹⁰⁵ See, e.g., L. FRIEDMAN, *supra* note 18, at 126-46; J. DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY (1970); D. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND, 1630-1776 (1967); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937); sources cited *infra* note 110.

¹⁰⁶ *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting). The "pursuit of happiness," of course, fell by the wayside sometime between the Declaration of Independence and the Constitution, though the phrase remains an explicit guarantee in various state constitutions. It might have embarrassed Brandeis to be more precise, as his reference had been replaced by rights in property.

¹⁰⁷ *Id.*

¹⁰⁸ C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913). It should be noted that Beard wrote an introduction to THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS (A. Liff ed. 1930), in which he

example, makes Brandeis' celebratory historiography seem, at a minimum, naive. No matter what position one took on the issue of Beard's economic determinism, anyone serious about the actual history of the Constitution knew by 1928 that there had been deep divisions among those who "conferred" the Constitution and the Bill of Rights on their fellow Americans. It was a gift granted voting white male citizens as well as non-property holders and women and involuntary recipients such as Indians and slaves.¹⁰⁹ The limit to any right to be let alone for those disfranchised groups is obvious, even without consideration of the history of extensive regulation of everyone's economic, political, and social life in the late eighteenth century.¹¹⁰

That Brandeis' constitutional faith is built upon a noble historical lie seems even more blatant when one considers how limited that "most valued right" proves to be in *Olmstead* itself. *Olmstead* dealt with the dubious crime of violations of Prohibition. The Court considered the case before it against a backdrop of astonishing misconduct by government officials that extended far beyond the wiretap issue, the question on which the Supreme Court exercised

celebrated Brandeis for "a minimum of legal legerdemain and a maximum of data and logic" and confidently predicted:

We may be sure that the realistic, fact-burdened method which [Brandeis] has employed in all his thinking about legal and economic affairs will have an increasing influence on coming generations of students, lawyers, and judges. Humanity and ideas, as well as things, are facts, and a jurisprudence which takes them into account cannot perish from the earth.

Id. at xx-xxi.

¹⁰⁹ As a convincing illustration of his claim that it is impossible to distinguish between conclusive presumptions and legal fictions, Lon Fuller used the "presumption that the grantee of a gift has accepted it." L. FULLER, *LEGAL FICTIONS*, *supra* note 6, at 41. The tragic power of the multitude of fictions surrounding the purported gift of civilization conferred upon unwilling recipients such as the Indian nations is told exceptionally well in Ball, *Constitution, Court, Indian Tribes*, 1987 AM. BAR FOUND. RES. J. 1. See also D. BELL, *RACE, RACISM AND AMERICAN LAW* (2d ed. 1980); Minow, "Forming Underneath Everything That Grows": *Toward a History of Family Law*, 1985 WIS. L. REV. 819.

¹¹⁰ For examples of extensive government intrusions, including regulation of one's proper place in life through sumptuary laws and of the market through numerous regulations in the colonial and early Republic periods, see O. HANDLIN & M. HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY, MASSACHUSETTS, 1774-1861* (1947); L. HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT* (1948); R. ISAAC, *THE TRANSFORMATION OF VIRGINIA, 1740-1790* (1982); F. McDONALD, *supra* note 8, at 9-55.

its new certiorari jurisdiction.¹¹¹ For example, federal prosecutors threatened to indict the foreman of the grand jury if he did not follow instructions, and they blatantly abused traditional rules of evidence during the trial.¹¹² Yet the right Brandeis advances is protected only from "every *unjustifiable* intrusion by the Government upon the privacy of the individual."¹¹³ Brandeis' use of a classic weasel word, "unjustifiable," allows individual judges to retain discretion to second-guess everyone else as to what is justifiable.

In *Olmstead*, Brandeis rejects the views not only of a majority of his brethren, and three of the four lower federal judges to consider the issue,¹¹⁴ but, more significantly in my view, also the views of a jury.¹¹⁵ The *Olmstead* jury actually was more representative than many during the same period, and Olmstead's lawyer, George W. Vandever, known as "the Clarence Darrow of the West," stressed government misconduct and argued for jury nullification in his summation.¹¹⁶ Were these citizens—who stood up to the substantial support Olmstead got from political powers in Seattle and who voted to convict under a wildly unpopular law—not able to recognize White's "essential conditions" of human life shared by all? Were they failures at "holding values of a sort . . . otherwise impossible" such as "the right to be let alone"? It would, of course, have been more difficult for Brandeis to celebrate "the right to be let alone" so eloquently if the crime had involved the kidnapping of a little girl, as Attorney General William Mitchell suggested,¹¹⁷ and not a "victimless" bootlegging operation. With

¹¹¹ The certiorari jurisdiction and its relationship to appeals were elaborated in the Act of Feb. 13, 1925, 43 Stat. 936, 938, known as the Judges' Bill. Chief Justice Taft labored long and hard for passage of the bill, and this may help explain his sensitivity when, after the Court voted to take the *Olmstead* case on rehearing, in Taft's view Brandeis unethically went beyond the question on which certiorari had been granted. See W. MURPHY, *supra* note 95, at 54-55, 59-60, 100.

¹¹² See W. MURPHY, *supra* note 95, at 25-45. Judge Frank Rudkin's dissent in the court of appeals, *Olmstead v. United States*, 19 F.2d 842, 843 (9th Cir. 1927), pointedly emphasized a number of prosecutorial abuses.

¹¹³ *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

¹¹⁴ See *Olmstead v. United States*, 19 F.2d at 842, 848 (Judges Gilbert and Dietrich affirming the trial judge; Judge Rudkin dissenting).

¹¹⁵ See *id.* at 844-45.

¹¹⁶ See W. MURPHY, *supra* note 95, at 34-35.

¹¹⁷ *Id.* at 132-33.

his band of undifferentiated Constitution-makers at his side,¹¹⁸ however, Brandeis warns that "the greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding."¹¹⁹ After all, Brandeis argues, "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."¹²⁰ Brandeis draws a bright line between the acceptable beneficence of his Constitution-conferers and their happy mediums, the dissenters in *Olmstead*, on the one hand, and more modern government action, on the other.¹²¹

¹¹⁸ See *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

¹¹⁹ *Id.* at 479.

¹²⁰ *Id.* Brandeis here echoed Madison's warnings in *The Federalist Papers* about the dangers of allegedly beneficent government action. See THE FEDERALIST No. 51, at 355 (J. Madison) (B. Wright ed. 1961).

¹²¹ An element of Brandeis' passionate opposition to wiretapping, undoubtedly, was his general dislike for technology. In his *Olmstead* dissent, Brandeis accurately predicts that "[t]he progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping," 277 U.S. at 474, and catalogued a parade of horrors in which "[d]iscovery and invention" already made it possible for the government, "by means far more effective than stretching upon the rack," to obtain disclosure in court of what "is whispered in the closet." *Id.* at 473. Indeed, Brandeis asserts, "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping." *Id.* at 476.

It is easy to applaud Brandeis for his foresight as well as his concern for "the most intimate occurrences of the home." *Id.* at 474. It is harder to explain, however, what criteria for judicial guidance Brandeis is suggesting when he emphasizes Chief Justice John Marshall's, "[w]e must never forget that it is a constitution we are expounding." *Id.* at 472 (quoting *McCulloch v. Maryland*, 17 U.S. at 407). Though I side with Brandeis, I remain unclear about what constitutional standards provide a rebuttal to those who would claim that "a constitution intended to endure for ages to come," *McCulloch*, 17 U.S. at 415, and "to be adapted to the various crises of human affairs," *id.*, are texts which should be judicially interpreted to recalibrate constitutional costs and benefits when the issue is organized crime, a kidnapped young girl, sophisticated white-collar crime, or a terrorist hiding an atom bomb under Manhattan. *Cf.* *United States v. Leon*, 468 U.S. 897 (1984) (weighing exclusionary rule against not punishing guilty).

The bomb example was employed by Charles Black in a well-known article, *Mr. Justice Black, The Supreme Court, and the Bill of Rights*, HARPER'S, Feb. 1961, at 63. Dean Calabresi makes several important points about the example, and about Justice Hugo Black's reaction to it, in *Ideals, Beliefs, Attitudes*, *supra* note 9, at 167 n.240. Calabresi points out that we often resort to various subterfuges, and sometimes like to have it both ways when our principles clash, as with euthanasia; we then allow the jury to be merciful even as we want to prohibit

This review of a few of the internal inconsistencies within the two most famous paragraphs of Brandeis' *Olmstead* dissent merely touches upon a central and profound audience problem facing Brandeis. This led him to employ legal fictions. Whether he did so intentionally or not is not crucial. But it is important to consider Brandeis' audience briefly before we are swept away by faith in dialogue and admiration for great rhetoric that advances positions we favor.

E. Contraries and Consistency

In Brandeis' opinion the year before *Olmstead* in *Whitney v. California*¹²²—his other brilliant explication of what most of us wish the Framers had envisioned—Brandeis *concurred* in a decision upholding the conviction of Justice Field's niece for her presence at a meeting held by a political group not favored by California law enforcement personnel.¹²³ Ironically, in that *Whitney* concurrence—in my view the most powerful judicial discussion of first amendment freedoms ever written—Brandeis seemed to identify a foremost right somewhat different from the right to be let alone. It was a right that was also a duty, a concept somewhat difficult to reconcile with the right to be let alone. In *Whitney*, Brandeis wrote,

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth; that without free

mercy killings. *Id.* at 88-89. My colleague Kathryn Abrams argues that Calabresi is provocative but not entirely convincing when he begins to distinguish acceptable from unacceptable constitutional subterfuges. Abrams, *supra* note 9, at 1649-53. There is an important link between our propensity to pose extreme hypotheticals in legal discourse and our promiscuous use of legal fictions. See generally Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

¹²² 274 U.S. 357 (1927).

¹²³ *Id.* at 372 (Brandeis, J., concurring).

speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.¹²⁴

There is a great appeal in this celebration and idealization of our fellow citizens and the founders. But when we get down to cases, as it were, we often find mean-spirited, exploitative, or inert folks peering out from behind the screen. Such tendencies cannot be blamed entirely on false consciousness, nor is it clear how to reform the situation without the kind of beneficent government action Brandeis warned us to be most on our guard against.

The same year as *Whitney*, Brandeis voted not to let Carrie Buck alone. He joined Justice Holmes' infamous opinion allowing sterilization¹²⁵ on the grounds that "[t]hree generations of imbeciles are enough."¹²⁶ A brief search of volume 277 of *United States Reports*, in which *Olmstead* appears, reveals several more opinions joined by Brandeis which upheld intrusions that might shock the conscience of most of us today.¹²⁷

To be fair, it is not clear that Professor White always places high value on consistency within his development of a language of

¹²⁴ *Id.* at 375.

¹²⁵ *Buck v. Bell*, 274 U.S. 200 (1927); see generally Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418 (1981); Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833 (1986); Gould, *Carrie Buck's Daughter*, 2 CONST. COMMENTARY 331 (1985).

¹²⁶ *Buck v. Bell*, 274 U.S. at 207.

¹²⁷ In *Williams v. Great Southern Lumber Co.*, 277 U.S. 19 (1928), Brandeis joined a unanimous opinion by Justice Sanford reversing a damages award to the widow of a white union organizer killed after he was seen with a black man in Bogalusa, Louisiana. The lumber company employed 2500 people and the key issue was whether Williams was killed by a mob or by a peace officer's posse called by the factory whistle. In *Gaines v. Washington*, 277 U.S. 81 (1928), Brandeis joined a unanimous opinion by Chief Justice Taft noting the novelty of a claim that a sixth amendment equivalent applied to the states through the fourteenth amendment, but not reaching it because, without timely objection, the defendant could not raise his claim that the public was excluded and that he was not present for part of his trial.

judicial criticism,¹²⁸ nor should we ignore the danger of making

¹²⁸ On the one hand, White condemns some, like Odysseus, whose "character is so defective as to allow him to think consistency irrelevant." J.B. WHITE, *HERACLES' BOW*, *supra* note 77, at 11. (Ironically, the code-word "character" was used publicly by opponents of Brandeis' appointment to the Supreme Court in 1916; they, including William Howard Taft, objected to Brandeis "on the ground of his character." J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 71 (1976).) White also argues that "[t]he most basic rule of logic (the rule of noncontradiction) and the most basic rule of justice (like results in like cases) both require consistency of meaning." J.B. WHITE, *HERACLES' BOW*, *supra* note 77, at 68.

On the other hand, White finds great merit in Edward Gibbon's writing, for example, because Gibbon "keeps . . . tension or paradox, this uncertainty, constantly before the reader, where it must be faced and responded to, rather than hidden in his premises or assumptions." *Id.* at 161. Because Gibbon's idea of history "entails incompatible imperatives" and "is full of characterization, indeed of stories, that one simply cannot regard as true, nor even as false," White begins to seek "some other kind of meaning." *Id.* at 158. White praises Gibbon for offering "an alternative place to stand," though he notes that Gibbon's text "creates a civilization, but not a community." *Id.* at 160.

This all seems rather abstract to me and a trifle too much like Zen or the mysteries of motorcycle maintenance known only to the initiated. The process by which John Marshall, according to White, somehow created a reciprocal community in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), also remains a bit mysterious. But there it is:

At the end, despite its magisterial tone, this opinion turns to the reader it has instructed in its methods and says to him: it is now time for you to remake our language, to constitute and reconstitute our community and culture anew, as I have done; you must build on what I have made.

J.B. WHITE, *WHEN WORDS LOSE THEIR MEANING*, *supra* note 77, at 263. Perhaps other readers may be better able to distinguish Marshall's "double voice rather like that of the Constitution itself: on some matters it declares itself with authority; on others it is silent." *Id.*

It is precisely because "the most prominent feature of the judicial opinion is that it is not an isolated exercise of power but part of a continuing and collective process of conversation and judgment," *id.* at 264, that I think we should be a bit less hasty than White seems to be to proclaim Marshall the master *teacher*. Marshall may be more the Master Builder; yet even his logical flights in *McCulloch* were brought down to earth by Justice Holmes, who responded to Marshall's idea that the power to tax is the power to destroy with his own magisterial tone in the same volume of *United States Reports* in which *Olmstead* appears. In *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928), Holmes wrote in his dissent: "The power to tax is not the power to destroy while this court sits." To me, Holmes both here and in his marvelous essay in *Springer v. Phillipine Islands*, 277 U.S. 189, 211 (1928), about the lack of precision in the "veiling words" of the Constitution, strips away some of the *Wizard of Oz* paraphernalia frequently employed by Marshall.

This does not make Holmes more lovable than Marshall, just more candid. But it does undermine or severely limit White's celebration of "the continuing and collective process" as "the most prominent feature of the judicial opinion." The

anachronistic judgments about intrusions on persons which today seem unjustifiable. My basic point is different: I want to underscore a fundamental problem inherent in the judicial role of writing appellate opinions. The judge wants to persuade. To do so, she may have to fool the audience somewhat or oversimplify to a point which is misleading.

This problem is highlighted in the second part of Brandeis' *Olmstead* dissent. Here Brandeis reaches the question of whether the use of the illicit means by government agents—*i.e.*, wiretapping, in violation of the criminal law of Washington state—should be relevant to the admissibility of evidence thereby obtained. Brandeis produces a powerful essay about the need to maintain respect for law. He argues that “decency, security and liberty”¹²⁹ all demand that government officials be subjected to the same rules of conduct which command all citizens. Otherwise, Brandeis warns, “government will be imperilled.”¹³⁰ According to Brandeis, the idea that the end justifies the means in the administration of criminal law is a “pernicious doctrine.”¹³¹ If adopted, such an approach “would

judicial opinion may not be entirely isolated, but it is an exercise of power. Moreover, I fear that only a very small, elite collective of people, in addition to judges, ever get to converse and render judgments about what it is that judges decide is worthy of reconstitution.

¹²⁹ *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting). It is worth noting that until *Olmstead*, Brandeis had consistently voted to uphold Volstead Act prosecutions. In the face of a strong double jeopardy claim in *Albrecht v. United States*, 273 U.S. 1 (1927), for example, Brandeis wrote for a unanimous Court rejecting the defendants' claim. He first had to determine that “a false arrest does not necessarily deprive the court of jurisdiction of the proceeding in which it was made.” *Id.* at 8. Brandeis stretched to find that the defendants subsequently waived their objections, and that the government cured all defects. Next, Brandeis wrote that Congress did not violate the Constitution by punishing all the steps leading to the consummation of a criminal transaction, and the completed transaction itself. *Id.* at 11; see also *Lambert v. Yellowley*, 272 U.S. 581, 596-97 (1926) (Brandeis majority opinion upholding criminal law that prohibited doctors' prescription of intoxicating beverages for medicinal purposes, using permissive standard of review, and noting “no right to practice medicine” that is not subordinate to police power of state and congressional power to enforce the eighteenth amendment); *United States v. One Ford Coupe Automobile*, 272 U.S. 321 (1926) (Brandeis majority opinion allowing federal government to “adopt” seizure initially made by official not authorized to make it, justified on basis of failure to pay tax it was not legally possible to pay); A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 566-67 (1946). As Mason put it, Brandeis believed that “[i]ndividualism and its values were indispensable but the advance of technology and mass production demanded closer governing, greater social control, if liberty was to have any meaning.” *Id.* at 554.

¹³⁰ *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

¹³¹ *Id.*

bring terrible retribution."¹³² After all, in Brandeis' famous words, "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."¹³³

Brandeis makes a powerful point here and I wish more people were persuaded by it. Nevertheless, he uses legal fictions—of both the emotive and the shorthand variety—to make it.¹³⁴ Manipulation of means for allegedly beneficent ends is, of course, close to the core of the problem in the use of legal fictions. Within his *Olmstead* dissent, Brandeis informs whatever audience he believes he is addressing of what appear to be inconsistent fundamental truths he has discovered in authoritative sources he does not disclose. The right to be let alone is the most comprehensive right; the government is the omnipotent teacher; we should fear beneficent governmental action. Brandeis also demonstrates his willingness to roam far beyond the constitutional text—Holmes, in a separate dissent, actually mentions but does not reach the issue of what is covered by "the penumbra of the Fourth and Fifth Amendments"¹³⁵—on his noble quest for constitutional meaning. But it may be impossible to reconcile that quest, as spelled out in his *Olmstead* dissent, with Brandeis' vaunted faith in majoritarian solutions to constitutional problems, his fabled belief in judicial restraint, and the Brandeis-as-teacher role.¹³⁶

¹³² *Id.*

¹³³ *Id.* To me, it seems a bit difficult to reconcile this bold statement with "the right to be let alone," just as it is hard to make them both jibe with Brandeis' famous statement that "[s]unlight is . . . the best of disinfectants." L. BRANDEIS, *OTHER PEOPLE'S MONEY* 92 (1914).

¹³⁴ See L. FULLER, *LEGAL FICTIONS*, *supra* note 6, at 53-56.

¹³⁵ *Olmstead*, 277 U.S. at 469 (Holmes, J., dissenting). It is ironic that Justice Douglas flailed about for support for his recognition of penumbras emanating from the Bill of Rights in *Griswold v. Connecticut*, 381 U.S. 479 (1965), but did not cite this reference to "the penumbra of the Fourth and Fifth Amendments" by the revered, notoriously hard-headed Justice Holmes. Holmes referred to penumbras from other constitutional sources in his dissent in *Springer v. Phillipine Islands*, 277 U.S. at 209.

¹³⁶ One of Brandeis' most famous opinions, in which he urged judicial restraint, was *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274 (1928), decided two weeks before *Olmstead*. The cases in which Brandeis objected vehemently to the Court's refusal to defer to legislative judgments are legion, even extending to his dissent from a majority opinion written by his usual comrade in such battles, Justice Holmes, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). The majority failed to recognize, according to Brandeis, that "values are relative," *id.* at 419, and that determinations of public purpose therefore should be left to the legislative branch. *Id.* at 420; see generally Friedman, *A Search for Seizure: Pennsylvania Coal Co. v. Mahon in Context*, 4 L. HIST. REV. 1 (1986).

The Court, after all, is always potentially the "teacher[] in a vital national seminar."¹³⁷ But it is a serious mistake to believe that nearly two centuries of lessons taught by the Court are consistent. The Court's opinions neither generally nor consistently stand for expansion of the rights of the downtrodden or recognition of the claims of individuals against government. We still lack any clear idea of what we expect a good or great judge to do. In the post-realist world, we may expect little more of a great judge than that she advance ideas to change the law in what turns out to be a promising direction while simultaneously purporting to be a votary of precedent or original intent. Perhaps we judge judges by their skill at covering their tracks, as Cardozo did so well. In other words, the successful and creative judge may be the one who is best at maintaining the protective coloration of legal fictions.

III. DEATH, PAIN, AND GREATNESS

For all that, I believe Justice Brandeis was a great justice, and his *Olmstead* dissent is an opinion which soars. I want to try to show that what Bob Cover had to say about constitutional interpretation, including the powerful and controversial point he made that we should, in effect, never forget the iron fist beneath the glove of judicial hermeneutics,¹³⁸ actually offers a key to understanding the great appeal of Brandeis' *Olmstead* dissent. Cover provided a surprising bridge toward White's celebratory view. There are occasions, as Maitland once put it, when "a fiction that we need most feign is somehow or another very like the simple truth."¹³⁹

¹³⁷ Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952). When Tocqueville noted that "the type of oppression which threatens democracies is different from anything there has ever been in the world before," he warned, "I do not expect their leaders to be tyrants, but rather schoolmasters." A. TOCQUEVILLE, *supra* note 5, at 691.

¹³⁸ See Cover, *supra* note 2, at 819-20.

¹³⁹ 3 F. MAITLAND, COLLECTED PAPERS 316 (1911), *quoted in* L. FULLER, LEGAL FICTIONS, *supra* note 6, at 10. Often, to be sure, there is much that is not true and sometimes destructive in myths. See, e.g., F. KAFKA, *The Refusal*, in PARABLES AND PARADOXES 161 (N. Glatzer ed. 1961). For a comparison of the "noble lie" of the doctrine of *Ex parte* Young, 209 U.S. 123 (1908), with the metaconstitutional doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), see Soifer & Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977). There is also much that resonates, has power, and may capture essential truths

The compelling element of Brandeis' marvelous rhetoric seems to me inextricably intertwined with his prophetic tone. It was surely no accident that Brandeis was dubbed "Isaiah" by his young admirers.¹⁴⁰ As he assumed the role of prophet, Brandeis unleashed warnings and sought to uplift. His prophecy was not predictive, nor did historic details matter. The message was intended to be inspirational. Brandeis always sought to teach.

He nagged Holmes, for example, to "get some sense of the world of fact."¹⁴¹ In an entertaining illustration of their different outlooks, Brandeis excitedly outlined a course of study of the textile industry for Holmes before one summer recess. Holmes let Brandeis ramble on, but decided it was much more important for him to spend his time, now that he was in his eighties, reading or rereading the classics he thought it necessary to have read if one wished to die a gentleman.¹⁴² After lengthy labor over an opinion, we are told, Brandeis liked to tell his clerks, "Now I think the opinion is persuasive, but what can we do to make it more instructive?"¹⁴³

Brandeis enthusiastically donned the robe of teacher, and he was not shy about accepting the prophet's garments as well.¹⁴⁴ It is not as difficult, and less significant, to show as some have done, that Brandeis got his facts quite wrong on occasion;¹⁴⁵ it would amount to toppling a giant if someone demonstrated that Isaiah himself was hypocritical or corrupt.¹⁴⁶

in myths. See, e.g., M. ELIADE, *MYTH AND REALITY* (1968); Miller, *Gift, Sale, Payment, Raid: Case Studies in the Negotiation and Classification of Exchange in Medieval Iceland*, 61 *SPECULUM* 18 (1986).

¹⁴⁰ P. IRONS, *THE NEW DEAL LAWYERS* 20 (1982).

¹⁴¹ Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 S. C.T. REV. 299, 335.

¹⁴² Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 *VAND. L. REV.* 71, 75 (1978); see Letter from Oliver Wendell Holmes to Sir Frederick Pollock (May 16, 1919), reprinted in 2 *HOLMES-POLLOCK LETTERS* 13 (M. Howe ed. 1961); Hamilton, *On Dating Mr. Justice Holmes*, 9 *U. CHI. L. REV.* 1, 24 (1941).

¹⁴³ Freund, *Justice Brandeis: A Law Clerk's Remembrance*, 68 *AM. JEWISH HIST.* 7, 11 (1978), quoted in Urofsky, *supra* note 141, at 301.

¹⁴⁴ The most controversial attack on Brandeis and his image appears in B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* (1982). For a lucid review of the bidding in the recent flood of books on Brandeis, see Marcus, *Falling Under the Brandeis Spell* (Book Review), 95 *YALE L.J.* 195 (1985).

¹⁴⁵ See, e.g., T. MCCRAW, *PROPHETS OF REGULATION* 80-142 (1984).

¹⁴⁶ This may help explain some of the fervor over Bruce Murphy's book, *supra* note

Of course, this is not the appropriate place to plunge into the current debate about Brandeis' place in history. Instead, through my limited focus on Brandeis' *Olmstead* dissent, I want to discuss why that opinion, for all its faults, retains the capacity to inspire and the power to convince. It seems worth emphasizing that there are connections between Brandeis' language and the words we attribute to Isaiah.¹⁴⁷ The reason Isaiah's words still have great power today is not, I think, because most of us fear divine retribution for failing to heed his warnings. Rather, Isaiah's words still grab and hold us, as do the words of Brandeis, largely because those words raise us to the heights by lowering our sights to those being trampled in the general rush to get ahead.

We are called upon to see and feel and to identify with the downtrodden and those without power who still dare to confront the powerful. We are told emphatically that going through the motions of formal justice is not justice. Isaiah's challenge is: "Learn to do well, seek justice, relieve the oppressed, judge the fatherless, plead for the widow."¹⁴⁸ Isaiah pierced the forms of empty observance and then called upon his people to "draw out thy soul to the hungry, and satisfy the afflicted soul."¹⁴⁹ Only by actually doing justice could the people be restored. Isaiah's vision of justice has little to do with immediate self-interest and much to do with obligations to the hungry, homeless and afflicted. Only by taking their side, along with Brandeis and Cover, can we show the courage necessary to redeem ourselves. As Charles Black recently put it, we must see that "[s]ins against human rights are not only those of commission, but those of omission as well."¹⁵⁰

144. Its publication was front-page news in the *New York Times* and a spirited debate followed, which included a strong defense of Brandeis in Cover, *The Framing of Justice Brandeis*, NEW REPUBLIC, May 5, 1982, at 17.

¹⁴⁷ For a discussion of the apparent 150-year gap between the Isaiah of chapters 1-34 and the Isaiah of chapters 35-66, see Friedman, *Isaiah*, 9 ENCYCLOPEDIA JUDAICA 43 (1972). See also J. HERTZ, *The Authorship of the Second Part of Isaiah*, in THE PENTATEUCH AND HAFTORAHs 941 (2d ed. 1961).

¹⁴⁸ *Isaiah* 1:17.

¹⁴⁹ *Isaiah* 58:10. This section from Isaiah is recited after the reading of the Torah on the morning of Yom Kippur, the Day of Atonement.

¹⁵⁰ Black, *supra* note 24, at 1112. Interestingly, White quotes Edmund Burke to somewhat similar effect: "equal neglect is not impartial kindness." J.B. WHITE, *HERACLES' Bow*, *supra* note 77, at 84 (quoting E. BURKE, *REFLECTIONS ON THE*

When Bob Cover wrote of constitutional interpretation in terms of pain and death, he did not mean thereby to diminish it. In fact, Bob was no pacifist and he did not always seek to turn the other cheek. He was an anarchist who loved law,¹⁵¹ an activist devoted to the idea that law could do much more than merely serve as umpire of the status quo. As Brandeis did in *Olmstead*, Cover focused on "the significance of man's spiritual nature, of his feelings and of his intellect," without denying the importance of "material things" for "the pain, pleasure and satisfactions of life."¹⁵² This helps explain Bob Cover's fascination with what he called "sacred narratives of jurisdiction."¹⁵³ Jurisdiction is, after all, the archetypal lawyer's construct. It is also the battleground over whether and when law might be used to limit the powerful. This helps explain Bob Cover's preoccupation with the dispute between Safed and Jerusalem over reestablishment of the rabbinic line in 1538, as well as the links he perceived between that little-known contest over jurisdiction, and those of antislavery, Vietnam protest, capital punishment, and the like.¹⁵⁴ In short, he pursued the use of bold legal ideas to confront and perhaps confine present manifestations of the sins of the past.

As he so often did, Bob Cover surprised his friends when he insisted in his Georgia presentation that he was not an abolitionist when it came to the death penalty. I think, though I am not sure, that this position evolved from his study of the *Talmud*. What lingers, however, in addition to the personal grief many of us share over losing the chance to argue more about that issue with Bob, is that Bob went on to make a compelling point not only about

REVOLUTION IN FRANCE, AND ON THE PROCEEDINGS IN CERTAIN SOCIETIES IN LONDON RELATIVE TO THAT EVENT 258 (C. O'Brien ed. 1969)); see generally J. NOONAN, *PERSONS & MASKS OF THE LAW* (1976).

¹⁵¹ Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179 (1985).

¹⁵² *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

¹⁵³ Cover, *supra* note 151, at 181. Bob described his anarchism as "the absence of rulers, not the absence of law." *Id.* Indeed, he celebrated law for its possibilities. He said that law "is the bridge—the committed social behavior which constitutes the way a group of people will attempt to get from here to there." *Id.* (emphasis in original).

¹⁵⁴ See, e.g., *id.* at 183-97; see also Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

the jurispathic quality of judging, but about the profound moral issue of complacency. In *Justice Accused*,¹⁵⁵ Bob's brilliant inquiry considered the various modes of retreat attempted by those who had the power to judge slavery but chose not to do so. In a post-Holocaust universe, complacency may present the most troubling example of the complexity of moral choice. One thing that should be said emphatically about Bob Cover is that he lived a less complacent life than do most of the rest of us who enjoy the perquisites and self-satisfaction we come to regard as our due for having competed successfully enough to land law-teaching jobs.

In Bob Cover's analysis of what he termed the "Judicial Can't";¹⁵⁶ in his probing inquiry into the possibilities in radical assertions of jurisdiction;¹⁵⁷ in his sensitivity to what is lost as well as what is gained in the normative universe because of legalization;¹⁵⁸ and in his direct participation in the work of the Yale Legal Services Organization, the Yale Employees Union, the South African divestment movement, etc., etc., we can readily perceive continuity with Brandeis at his best. I believe Bob created connections to the tradition of Isaiah as well.

CONCLUSION

What judges say and how they say it matters. Brandeis dissented in *Olmstead* because he wished to use the power at his command to resist the greater violence available to the state to enforce its criminal laws. Brandeis may have romanticized history egregiously and he may have paid little attention to consistency and not much more to the context of the case. What Brandeis did magnificently, however, was to persuade and to inspire. Brandeis' didactic technique and his assumption that his own opinion occupied the highest moral ground are somewhat unfashionable today. But *Olmstead* is great legal fiction; in it, Brandeis gave lasting instruction about the need to heed spiritual as well as material values and to be on guard against the tendency to overreach by those in power.

Thinking of White and Cover on a continuum, rather than as

¹⁵⁵ R. COVER, *supra* note 4.

¹⁵⁶ *Id.* at 119-30.

¹⁵⁷ Cover, *supra* note 151.

¹⁵⁸ *Id.*

polar opposites who disagree in their assumptions about human nature, illuminates why both so admired Brandeis. Both knew that words do not convey a certain meaning, as Madison elaborated beautifully in *Federalist No. 37*.¹⁵⁹ Yet these two accomplished readers and wordsmiths seemed to agree, albeit for very different reasons, that Brandeis' legal fictions succeeded somehow. Brandeis' legal fictions could inspire and shape future thought more than they reflected the past. My hunch is that this success is inseparable from a shared ideal that words—words themselves used as radical narratives of jurisdiction—sometimes can create strong boundaries as well as connections. They can fence out and battle with the very power of the state.

Today, many of us feel we are somehow in exile. Much of the nation seems anxious to ride back into mythical Death Valley days or to return to the Gilded Age when one purportedly could be certain that the good guys were winning. Leading legal fictions of a century ago are still with us.¹⁶⁰ These particular legal fictions unfortunately demonstrate the staying power of such inventions and their potential to do great harm by narrowing thought and deed. As Cover wrote: "History corrects for the scale of heroics that we would otherwise project upon the past. Only myth tells us who we

¹⁵⁹ See THE FEDERALIST NO. 37, at 265 (J. Madison) (B. Wright ed. 1961). Richard Weisberg offers a fine discussion of this illustration of the indeterminacy of language, see Weisberg, *Text into Theory: A Literary Approach to the Constitution*, 20 GA. L. REV. 939 (1986), though the point does not diminish Madison's hope for, and utilization of, the power of words and even of parchment barriers. See, e.g., Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in J. MADISON, THE FORGING OF AMERICAN FEDERALISM: SELECTED WRITINGS OF JAMES MADISON 253 (S. Padover ed. 1953); Letter from James Madison to George Thompson (June 23, 1825), quoted in THE FORGING OF AMERICAN FEDERALISM, *supra*, at 21 n.15; cf. Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427 (1986).

¹⁶⁰ Two particularly troubling examples are the doctrine that a corporation is a person for purposes of fourteenth amendment protection, *Santa Clara County v. Southern Pacific Railroad*, 116 U.S. 394 (1886), and the idea that "it would be running the slavery argument into the ground" to compel equal access to public accommodations for blacks under the thirteenth and fourteenth amendments, *Civil Rights Cases*, 109 U.S. at 24, which combined with the bizarre application of the newly-minted "state action" doctrine to invalidate the Civil Rights Act of 1875. Cf. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

would become; only history can tell us how hard it will really be to become that.”¹⁶¹

So today, without much power, we work with words. Words help us understand and escape the tyrannies of the past. To be sure, words, like the many stories of history, have indeterminate and multiple meanings. Used eloquently, however, words may help us to seek change rather than continuity and to struggle for our aspirations rather than to accept that whatever seems to be is good enough.

In law, to work with words may mean to be caught continuously in the act of creating legal fictions. As Bob Cover warned, however, “We can never be sanguine about the capacity of courage to rescue itself.”¹⁶² Much that is important was said at the conference in Georgia last March. We may even have had our complacency shaken a bit. We emerged to seek fitting words, perhaps even new prophetic words, to “draw out our souls to the hungry” and to “satisfy the afflicted soul.”

¹⁶¹ Cover, *supra* note 151, at 190.

¹⁶² *Id.*

